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IN THE

Supreme Court of the United States

No. 77-1322

PRO-FOOTBALL, INC.,
and
District of Columbia Armory Board,

Petitioners,

v.

NORMAN F. HECHT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' MEMORANDUM IN REPLY

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OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit on December 20, 1977, in No. 75-1819, reversed a jury verdict in favor of petitioners and remanded for new trial on the grounds that the District Court erred in giving, or failing to give, at least four important instructions to the jury and erred in admitting, or failing to admit, at least two important pieces of evidence. The opinion of the Court of Appeals is reproduced as Appendix C to the Petition (pp. 45a-76a).

Petitioners previously filed a petition for a writ of certiorari in this case seeking review of a prior decision of the Court of Appeals that the 30 year restrictive covenant in the Redskins' lease on Robert F. Kennedy Stadium (RFK Stadium) is not exempt from the antitrust laws solely because the District of Columbia Armory Board is a party to the lease, in the absence of a specific statutory exemption and no evidence that Congress intended to confer such immunity. That petition was denied by this Court and reported at 404 U.S. 1047 (1971) and the prior decision of the Court of Appeals, No. 24,446, is reported at 444 F.2d 931 (D.C. Cir. 1971) and reproduced as Appendix A to the Petition (pp. 1a-34a). The opinion of the United States District Court for the District of Columbia, in which the District Court granted summary judgment in favor of petitioners, which was reversed by the first decision of the Court of Appeals, is reported at 312 F. Supp. 472, and reproduced as Appendix B to the Petition (pp. 35a-44a).

In the present Petition, petitioners again seek review of the prior decision of the Court of Appeals that the 30 year restrictive covenant in the Redskins' lease is not exempt from the antitrust laws. Petitioners do not seek review of any portion of the recent decision of the Court of Appeals remanding the case for another trial on the grounds that the trial court made prejudicial errors in instructing the jury and in admitting and failing to admit certain evidence.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the 30 year restrictive covenant in the Redskins' lease on RFK Stadium, which prohibits the Armory Board from leasing the stadium to any other professional football team for 30 years, and the refusal of the Redskins to waive it and consent to the use of the stadium by Hecht and his group of investors when the Redskins were not using it, constitute government action exempt from the antitrust laws, because the Armory Board is a party to the lease.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, Sections 1, 2 and 3, and the pertinent provisions of the District of Columbia Stadium Act, 2 D.C. Code §§1720 and 1723, are set forth in the Petition, Appendix D (pp. 77a-80a).

STATEMENT

This case involves the business venture of respondents, herein referred to as Hecht,[1] to promote and obtain an American Football League (AFL) franchise for the District

[1]Norman F. Hecht is Executive Vice President of Madison National Bank, President and Director of American Investment Corporation, Director of Auth Sausage Company, Director of Cullen Photo Company, Director of Parkway Medical Center and was a Branch Manager of Public National Bank. Harry Kagan was engaged in the retail liquor business and real estate investments. Marc Miller was part-owner of a downtown restaurant and is now Vice President of Riviera Investments, Inc.

of Columbia, and how they and their group of investors were blocked and prevented from obtaining a franchise by the 30 year restrictive covenant in the Redskins' lease on RFK Stadium, that prohibits the Armory Board from leasing the stadium to any other professional football team. In 1965, the AFL was a new league competing with the established National Football League (NFL). The AFL is now part of the NFL.

Hecht assembled a group of Washington businessmen in the summer of 1965 to purchase an AFL franchise for the District of Columbia. A written offer to purchase a franchise for $7,500,000.00, contingent upon the group obtaining the use of RFK Stadium for the exhibition of home games, was forwarded to the Commissioner of the AFL in the form suggested by the Commissioner.

Hecht submitted a letter to the Armory Board offering to lease RFK Stadium on those Sundays, Friday and Saturday nights when the stadium was not being used by the Redskins. The Chairman of the Armory Board advised Hecht by letter that the Armory Board was prohibited from leasing the stadium to his group because of the restrictive covenant in the Redskins' lease, that prohibited the Armory Board from leasing the stadium to any other professional football team, without the consent of the Redskins. But, the Chairman further stated that: "The Armory Board is, of course, very desirous of increasing revenues of the stadium and would be happy to consider any acceptable and legal arrangement under which your organization might use the stadium and by which an improvement in the Board's financial situation could reasonably be expected to result."[2]

[2]Plaintiff's Exh. 18, Letter from Francis Kane, Chairman of the Armory Board, to Hecht.

Hecht's proposal to lease the stadium, when the Redskins were not using it, was forwarded to the Redskins, but the President of the Redskins never responded to a written request by Hecht to meet to discuss sharing the use of the stadium and the Redskins failed to waive the restrictive covenant and consent to the use of the stadium by Hecht's group when the Redskins were not using it.

There were ample playing dates available on the Armory Board's schedules of events, during the years 1966-1974,[3] for another professional football team to have used RFK Stadium for the exhibition of its home games. There is no other stadium in the Washington metropolitan area suitable for the exhibition of professional football games. The University of Maryland stadium is not available for the exhibition of regularly scheduled football games of a professional football league.

The Redskins obtained the 30 year restrictive covenant in their lease during arms-length negotiations with the Armory Board.[4] In a memorandum to the Armory Board, the late Chester Gray, Corporation Counsel, advised the Armory Board that the late George P. Marshall, President of the Redskins, was demanding, as a condition of the lease, that

[3]Plaintiff's Exh. 65 A thru I, lists of events held at stadium for the years 1966 thru 1974.

[4]Paragraph II(e) of the Redskins' lease provides as follows: "The Lessor shall have the right to lease or otherwise permit the use and occupancy of the Stadium during any period exclusive of such specific dates referred to herein for any purpose or purposes, (except as provided in subsection (a) of this Paragraph II), including (but not limited to) school, college or other amateur or professional baseball, football and basketball games and, also, for such other use or purpose as a Lessor may determine, *provided that at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins.*"

the stadium would not be leased to any other professional football team.

The Redskins concede that they wanted the 30 year restrictive covenant but the new management now contends that the 30 year restrictive covenant and 30 year lease term were reciprocal agreements between the Armory Board and Redskins and without them there would have been no lease and no stadium and therefore the restrictive covenant served the stadium's interest. The evidence is to the contrary. Mr. Milton King, attorney for the Redskins during the lease negotiations, testified that Mr. Marshall had promoted the new stadium for several years, that he did not care how long the term was and did not object to the 30 year term. Mr. King read at trial the Minutes of the Armory Board, dated August 28, 1978, which recorded Mr. Marshall advising the Armory Board that he had provided in his will that the Redskins would never leave Washington.[5]

The restrictive covenant was solely an added demand of the Redskins which did not serve the interests of the Armory Board or the public. It solely serves to protect the monopoly of the Redskins over professional football in the District of Columbia by giving them control of an essential stadium facility. The effect on the use of the stadium is contrary to the purpose of the Stadium Act, "to provide the people of the District of Columbia with a stadium suitable for holding athletic events." It limits the teams that the public can see perform and the number of games the public has the opportunity to attend. It also prevents the maximum use of the stadium and prevents the Armory Board from obtaining rent from a second team that would decrease the burden of the taxpayers. With more teams playing in the stadium, more

[5]Transcript pp. 2360-2362, 2364, 2365.

games and higher gross receipts, the public would be more thoroughly served in accordance with the purpose of the Stadium Act.

There is no provision in the Stadium Act by which Congress specifically exempted the Armory Board from complying with the antitrust laws in its operation of the stadium. There is no evidence in the record nor in the legislative history that indicates Congress intended to exempt the actions of the Armory Board and private parties dealing with it from the provisions of the antitrust laws. There is nothing in the legislative history which mentions the question of whether the Redskins or any other tenant should be given such a restrictive covenant.

Although a long term lease with the Redskins was desirable for financial reasons, nothing in the record or legislative history indicates that the Stadium Act would not have been passed if the long term lease with the Redskins was not obtained. To the contrary, the D. C. Stadium Act, authorizing the construction of the stadium, was passed by Congress in 1957, more than two years prior to the execution of the Redskins' lease on December 24, 1959. The minor amendments made to the Act in 1958 and 1959 have no bearing on this case. The fact that a long term lease with the Redskins was desirable for the Armory Board in order to float a bond issue, served to increase the bargaining power of the Redskins with which to press their demand that the stadium not be used by any other professional football team.

Hecht seeks damages against the Redskins only, who are the primary party in interest, and only injunctive relief against the Armory Board. Hecht alleges in Count I of the Third Amended Complaint that the 30 year restrictive covenant in the Redskins' lease on RFK Stadium constitutes

a contract in restraint of trade in violation of Sections 1 and 3 of the Sherman Act, because the restrictive covenant prevented Hecht and his group of investors from obtaining the use of RFK Stadium, which foreclosed Hecht and his group of investors from the business of professional football in the District of Columbia. In Count II it is alleged that the Redskins have maintained and protected their monopoly over professional football in the District of Columbia, in violation of Sections 2 and 3 of the Sherman Act, by obtaining the restrictive covenant and by not waiving it and consenting to the use of RFK Stadium by Hecht's group of investors for the exhibition of AFL games when the Redskins were not using it.

Trial by jury was commenced on March 25, 1975 and on April 25, 1975, the jury rendered a verdict for the Redskins. On December 20, 1977, the Court of Appeals remanded the case for another trial on the grounds that the trial court made at least four prejudicial errors in instructing the jury and erred in admitting and failing to admit certain evidence.

REASONS FOR NOT GRANTING THE WRIT

The reasons for not granting the writ of certiorari are:

1. The statutory interpretation by the Court of Appeals is consistent with applicable decisions of the Supreme Court;

2. The decision of the Court of Appeals, that the validity of the 30 year restrictive covenant in the Redskins' lease is subject to the antitrust laws, is consistent with the recent Supreme Court decisions defining the kind of government action that is not exempt from the antitrust laws;

3. Existing Supreme Court decisions give ample guidance that participation by government entities in agreements with private parties does not exempt the provisions of the agreement and conduct of the parties from the antitrust laws;

4. A prior petition for writ of certiorari was denied in a similar case; and

5. The decisions of the First, Sixth and Ninth Circuits, which petitioners allege conflict with the decision below and the decisions of other circuits, were all decided prior to the recent decisions of the Supreme Court clarifying the kind of government action that is exempt from the antitrust laws.

I.

STATUTORY INTERPRETATION CONSISTENT WITH APPLICABLE SUPREME COURT DECISIONS

The Redskins contend that the clause in the Stadium Act, "without regard to any other provision of law" exempts the Armory Board's actions in leasing D. C. Stadium from the antitrust laws and thereby provides immunity from the antitrust laws to the restrictive covenant obtained by the Redskins in their lease. But, the Court of Appeals found on examination of the Stadium Act, its legislative history and the administrative practice of the Armory Board, that Congress had evidenced no intention to exempt from the antitrust laws the actions of the Armory Board and private parties dealing with it. The Court of Appeals found in a statement made by Senator Bible, Chairman of the District

of Columbia Committee, when he was reporting on an amendment to the Stadium Act dealing with concessions, a strong inference that the clause "without regard to any other provision of law" was intended by Congress to free the Armory Board from the aegis of those regulations and laws applying to government agencies which would hamper it from operating the stadium as a private business, such as the competitive bidding and federal procurement regulations.[6] There is nothing in the legislative history that suggests Congress intended to give the Armory Board the authority to operate the stadium without regard to all of the laws of the federal government and all of the laws of the District of Columbia.[7]

The interpretation of the clause "without regard to any other provision of law", derived from the decision of the Court of Appeals, is that the clause provides the Armory Board with the authority to engage in any lawful acts necessary to construct, manage and operate the stadium, including entering into leases under lawful terms and conditions which do not violate either the federal or District of

[6]Senator Bible stated, when he was reporting to the Senate on an amendment to subparagraph (6) of Section 2-1723:

> "The Committee felt that, inasmuch as the stadium is to be in the *nature of a private venture*, it was more desirable that the Board be *vested with the authority to make its own decisions* as to the letting of concessions, without placing restrictions on the Armory Board." 103 Cong. Rec. 13567.

[7]Responsible officials of the Armory Board stated in their deposition testimony, which testimony was later read at trial, that operation of the stadium is subject to all the police, fire, and health regulations of the District of Columbia and that the Armory Board would not permit a violation of either the federal or District of Columbia laws. The Court of Appeals noted that Counsel for the Redskins on oral argument on appeal even said that of course the Armory Board has no power to lease the stadium for an illegal purpose. (See Appendix to Petition, p. 28a.)

Columbia laws, including the antitrust laws. This interpretation is consistent with the policies specifically expressed and followed by the Supreme Court when it has been faced with the reconciliation of two statutes with regard to the application of the antitrust laws. The two policies are: first, to give effect to both of the Acts if possible and, second, the repeal of the antitrust laws is strongly disfavored and is to be implied only if necessary to make the provisions of the later Act work. *Silver v. New York Stock Exchange*, 373 U.S. 341, 357-358 (1963); *California v. F.P.C.*, 369 U.S. 482, 485 (1962) and *United States v. Bordon Co.*, 308 U.S. 188, 198 (1939).

Most recently, Mr. Justice Stevens in the plurality opinion in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) stated that implied exemptions created by other federal statutes would be found only when:

> ". . . [the] exemption [is] necessary in order to make the regulatory Act work and even then only to the minimum extent necessary." at 597.

There is no necessity to imply an exemption from the antitrust laws in order to allow the Armory Board to perform its function of constructing, maintaining and operating the stadium. There is no clear repugnancy between running a stadium and granting free access to the use of the stadium by competing teams in so far as available dates will allow. The demand of the Redskins for a 30 year restrictive covenant is clearly not a conflicting government policy that requires the granting of authority to the Armory Board to lease the stadium in an anticompetitive manner.

Thus, the Court of Appeals decision is correct and consistent with the decisions of the Supreme Court and its policy not to hold that subsequent statutes displace the

antitrust laws, unless there is an unequivocably declared Congressional purpose to do so, e.g. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304-05 (1963); *California v. F.P.C., supra*; and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945).

II.

DECISION THAT RESTRICTIVE COVENANT IS SUBJECT TO ANTITRUST LAWS CONSISTENT WITH SUPREME COURT DECISIONS DEFINING KIND OF GOVERNMENT ACTION NOT EXEMPT FROM ANTITRUST LAWS.

The Court of Appeals decision, that the validity of the 30 year restrictive covenant in the Redskins' lease is subject to the antitrust laws, is consistent with the decisions of the Supreme Court in which it has defined the kind of government action that is not exempt from the antitrust laws. The Supreme Court has held in a recent decision that unless a state compels the private party to commit an act that there is no governmental action at all, but rather private action. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975). Essentially, the Court has established the rule that if a private party has free choice to pursue a course of conduct, that the conduct of the private party will not be cloaked in government action and deemed exempt from the antitrust laws merely because a government entity has approved, encouraged or participated in the private conduct. *Cantor v. Detroit Edison Co.*, supra at 592 and 593. Although private conduct was not involved, the Supreme Court recently

affirmed that the kind of action exempt from the antitrust laws, under the government action doctrine, is action compelled by state legislatures exercising their power of sovereignty for the public welfare. *City of Lafayette v. Louisiana Power & Light Co.*, No. 76-864 (1978). There is no reason this analysis should not hold true regardless of whether the federal government or a state is involved.

The decision of the Court of Appeals is consistent with the cited Supreme Court decisions because the restrictive covenant and the failure of the Redskins to consent to the use of the stadium by Hecht and his group of investors was not action compeled by Congress in the exercise of its legislative authority nor even compeled or required by the Armory Board. The Armory Board would have been willing to negotiate a lease with Hecht if he could have obtained the consent of the Redskins.[8] The real party in interest is the Redskins who demanded that they receive a 30 year restrictive covenant and who failed to waive the restrictive covenant and permit Hecht and his group of investors to use the stadium for the exhibition of AFL games. Accordingly, the decision below is correct and consistent with the decisions of the Supreme Court.

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[8]See page .

III.

SUPREME COURT HAS GIVEN AMPLE GUIDANCE FOR APPLICATION OF THE ANTITRUST LAWS TO CONTRACTS BETWEEN PRIVATE PARTIES AND GOVERNMENT ENTITIES.

The Supreme Court has given the lower courts ample guidance for the application of the antitrust laws to contracts between private parties and government entities. It is clear from the recent Supreme Court decisions in *Goldfarb, Cantor, Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) and *Lafayette v. Louisiana Power & Light Co., supra,* coupled with the earlier decisions in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690 (1961) and *Parker v. Brown*, 317 U.S. 341 (1943), in which the Court cite at 352 *Union Pacific R. Co. v. United States*, 313 U.S. 450 (1941), that a contract or lease entered into by a private party, freely and of its own choosing, with a government entity, is not government action that is immune from the antitrust laws solely because the government entity participates in it and is a party to it.

In *Parker* the Court stated that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade". The Court cited as an example *Union Pacific R. Co. v. United States, supra*, a case where the Court held that Kansas City had entered into a private agreement with the *Union Pacific R. Co.* for the exclusive use of a railroad terminal in violation of the Elkins Act. The Court's recognition in *Parker* of the distinction between the act of a state or municipality entering into an agreement with a

private party in restraint of trade and a restraint of trade imposed by a state through its legislative power, and the citing of *Union Pacific*, combined with the recent decisions in *Goldfarb, Cantor, Bates* and *Lafayette*, holding that there is no government action unless the state requires the anticompetitive activities, gives clear guidance to the lower courts that a contract or lease between a private party and government entity, where neither party is compelled to enter into the agreement by the sovereign act of the state or federal government, does not constitute government action exempt from the antitrust laws. See *Kurek v. Pleasure Driveway & Park District*, 557 F.2d 580 (7th Cir. 1977); *City of Fairfax v. Fairfax Hospital Association*, 562 F.2d 280 (4th Cir. 1977); *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975).

IV.

PETITION FOR WRIT OF CERTIORARI DENIED IN SIMILAR CASE.

The Supreme Court denied a petition for writ of certiorari to review the decision of the First Circuit Court of Appeals in *Paddock Pool Builders, Inc. v. George R. Whitten*, 424 F.2d 25 (1970), cert. denied, 400 U.S. 850 (1970), which decision was similar to the decision of the Court of Appeals in this case. In essence, the First Circuit held that actions of private parties and agencies are not immune from the antitrust laws when government agencies and private agencies are engaged in commercial dealings, merely because the government agency is a party to the

commercial activity. The petitioner in *Paddock* urged the Supreme Court to review the case because it contended as the Redskins do in this case that *Parker* established the broad general rule that valid governmental action in any context does not form the basis of private claims under the antitrust laws.

If *Paddock* was not deserving of the Court's consideration in 1970, the present case is surely less deserving in lieu of the Court's subsequent decisions in *Goldfarb, Cantor,* and *Bates*, and the very recent decisions in *Lafayette*, wherein the Court reviewed the prior cases and reaffirmed that action of government entities is not exempt from the antitrust laws if their action is not directly authorized by the state legislature.

V.

CONFLICTING FIRST, SIXTH AND NINTH CIRCUIT CASES PRIOR TO RECENT SUPREME COURT DECISIONS CLARIFYING THE KIND OF GOVERNMENT ACTION EXEMPT FROM ANTITRUST LAWS.

The First, Sixth and Ninth Circuit cases[9] which the Redskins contend conflict with cases of the Third, Fourth and Seventh Circuits,[10] thereby creating conflicts and

[9]Petitioners'' brief pp. 19-25, see E. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966) cert. denied, 385 U.S. 947 (1966); Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969).

[10]Duke & Co., Inc. v. Foerster, 521 F.2d 1277 (3d Cir. 1975); City of Fairfax v. Fairfax Hospital Association, 562 F.2d 280, (4th Cir. 1977), Kurek v. Pleasure Driveway & Park District, 557 F. 580 (7th Cir. 1977).

confusion in the application of the government exemption doctrine by the lower courts, were all decided prior to the Supreme Court's decision in *Goldfarb, Cantor, Bates* and *Lafayette.* Whereas, the decision of the Third, Fourth and Seventh Circuits were decided in 1975 and 1977, after having had the benefit of the Supreme Court's clarifying decisions in *Goldfarb, Cantor* and *Bates.* As should be expected, the decisions of the Third, Fourth and Seventh Circuits comply with the recent decisions of the Supreme Court. Since the Supreme Court has clarified the kind of government action that is exempt from the antitrust laws, there have been no conflicting decisions in the Circuit Courts nor any that conflict with the decisions of the Court of Appeals in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

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